Nos. 80-11 and 80-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION, ET AL., *Petitioners,*

v.

JICARILLA APACHE TRIBE, ET AL., *Respondents.*

AMOCO PRODUCTION COMPANY, ET AL., *Petitioners,*

v.

JICARILLA APACHE TRIBE, ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF NEW MEXICO, NORTH DAKOTA, UTAH AND WYOMING AS AMICI CURIAE

BRUCE L. HERR,

Counsel of Record

JOHN B. DRAPER
GARY R. KILPATRIC

Of Counsel

Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, N.M. 87501
(505) 982-3873

Counsel for Amicus Curiae State of New Mexico

(Counsel Continued on Inside Cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

ALLEN I. OLSON
Attorney General

ALBERT R. HAUSAUER
Special Assistant Attorney General

State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

Counsel for Amicus Curiae
State of North Dakota

ROBERT B. HANSEN
Attorney General

RICHARD L. DEWSNUP
MICHAEL QUEALY
Assistant Attorneys General

301 Empire Blvd.
231 East 4th South
Salt Lake City, Utah 84111
(801) 533-4446

Counsel for Amicus Curiae
State of Utah

JOHN D. TROUGHTON
Attorney General

RON ARNOLD
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82202
(307) 777-7841

Counsel for Amicus Curiae
State of Wyoming

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amici Curiae	1
Summary of Argument	2
Argument:	
I. The States Have The Exclusive Power To Tax The Severance Of Oil And Gas On Executive Order Indian Reservations	3
II. The Decision Of The Tenth Circuit Threatens To Impose Unreasonable Burdens On The Citizens Of The States	10
Conclusion	12

TABLE OF AUTHORITIES

CASES: PAGE

Crow Tribe of Indians v. *Montana*, 469 F.Supp. 154 (D. Mont. 1979) 11

Helvering v. *Mountain Producers Corp.*, 303 U.S. 376 (1938) 3

Hope Natural Gas Co. v. *Hall*, 274 U.S. 284 (1927)..... 3

Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) 3

Montoya v. *Bolack*, 70 N.M. 196, 372 P.2d 387 (1962) .. 10

Morton v. *Mancari*, 417 U.S. 535 (1974) 10

Oliver Iron Mining Co. v. *Lord*, 262 U.S. 172 (1923).... 3

Washington v. *Confederated Tribes of the Colville Indian Reservation*, 65 L.Ed.2d 10 (1980)..... 3, 4

UNITED STATES STATUTES:

25 U.S.C. §§398a-398e 2, 4, 7, 8, 9, 10

25 U.S.C. §§396a-396g 9

41 Stat. 139 (1920) 5

NEW MEXICO STATUTES:

§§7-29-1 to 7-29-22 N.M.S.A. 1978 3

§§7-30-1 to 7-30-26 N.M.S.A. 1978 3

§§7-31-1 to 7-31-25 N.M.S.A. 1978 3

§§7-32-1 to 7-32-27 N.M.S.A. 1978 3

§§7-33-1 to 7-33-22 N.M.S.A. 1978 3

§§7-34-1 to 7-34-20 N.M.S.A. 1978 3

Ch. 103, 1937 N.M. Laws 290 9

Table of Authorities Continued

MISCELLANEOUS:

	PAGE
American Indian Policy Review Commission, Final Report 344 (1977)	9
District Court Finding Nos. 34 and 35	11
H.R. Rep. No. 1791, 69th Cong. 2d.Sess. 2 (1927)	9
Jicarilla Apache Tribe Oil and Gas Severance Tax Ordinance	11, 12
Leasing of Executive Order Reservations: Hearings on H.R. 9133 Before a Subcomm. of the House Comm. on Indian Affairs, 69th Cong., 1st Sess. (1926)	5
Letter to Supreme Court Clerk from the Attorney General of New Mexico dated Novermber 18, 1980, on file in the Clerk's office	1
Right of the Cherokees to Impose Taxes on Traders, 1 Op. Att'y Gen. 645 (1824)	11
Supreme Court Rule 36.4	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-11 and 80-15

J. GREGORY MERRION, ET AL., *Petitioners,*

v.

JICARILLA APACHE TRIBE, ET AL., *Respondents.*

AMOCO PRODUCTION COMPANY, ET AL., *Petitioners,*

v.

JICARILLA APACHE TRIBE, ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATE OF NEW MEXICO, NORTH DAKOTA, UTAH AND WYOMING AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This Brief is filed on behalf of the State of New Mexico and is sponsored by the Attorney General of the State of New Mexico for purposes of compliance with Supreme Court Rule 36.4.[1] This brief is also filed on behalf of the States of North Dakota, Utah, and Wyoming.

Within the Amici States significant areas of land established as Executive Order Indian reservations contain substantial reserves of oil, gas, coal and other natural resources. The Amici States have exercised and

[1] See letter of November 18, 1980 from the Attorney General of New Mexico to the Supreme Court Clerk, on file in the Clerk's office.

relied upon their exclusive power to tax the extraction of oil and gas by non-Indian producers pursuant to 25 U.S.C. §§398a-398e for many years. If the decision of the Tenth Circuit is allowed to stand, it will undermine the congressional scheme embodied in 25 U.S.C. §§398a-398e and create serious consequences for the state taxing schemes and for the consumers of oil and gas.

SUMMARY OF ARGUMENT

I.

The State of New Mexico has the power to tax the extraction of oil and gas from Indian reservation lands. The severing of oil and gas is an activity properly subject to state taxation. The states were granted the exclusive power to tax the entire output of oil and gas on Executive Order Indian reservations under the Act of March 3, 1927, 25 U.S.C. §§398a-398e. It is clear from the Legislative history of the Act of March 3, 1927 that the Congressional policy expressed in that act was to divide the benefits of the severance of oil and gas upon Executive Order Indian reservations between the States and the Tribes by allocating to the States the exclusive power to tax the entire output of oil and gas production on such lands while granting to the Tribes all of the rental, royalty and bonus incomes from that production.

II.

The Tenth Circuit's decision effectively negates this longstanding Congressional policy of equitably allocating the benefits of oil and gas production between the Tribes and the States, and subjects the States to the risk of losing substantial revenue now generated by their severance taxes. The additional burden created by the Jicarilla severance tax will lead to a reduction in oil and gas pro-

duction from marginal wells, discourage exploration in all but proven areas, and cause other wells to be abandoned sooner than they would be under current conditions. In addition, it is obvious that the potential for abuse is great where those being taxed have no voice in the adoption of the tax. Moreover, non-reservation consumers are thereby forced to pay for some or all of the cost of tribal government through increased energy bills.

ARGUMENT

I.

The States Have The Exclusive Power To Tax The Severance Of Oil And Gas On Executive Order Indian Reservations.

The States have the power to tax the severance of oil and gas on Executive Order Indian reservations.[2] They enjoy this power under their general power to tax the severance of minerals within their boundaries, *see e.g.*, *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 65 L.Ed.2d 10 (1980); *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923); *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284 (1927), and under the specific authorization to tax oil

---

[2] *E.G.*, New Mexico tax statutes applicable to oil and gas production throughout the State, including Executive Order Indian reservations, are the Oil and Gas Severance Tax, §§7-29-1 to 22; the Oil and Gas Conservation Tax, §§7-30-1 to 26; the Oil and Gas Emergency School Tax, §§7-31-1 to 25; the Oil and Gas Ad Valorem Production Tax, §§7-32-1 to 27; the Natural Gas Processors Tax, §§7-33-1 to 22, N.M.S.A. 1978; and the Oil and Gas Product Equipment Ad Valorem Tax, §§7-34-1 to 20.

and gas production on Executive Order Indian reservations in the Act of March 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. §§398a-398e.

The State of New Mexico and other states are granted not only authorization to tax by Section 398c, but also the *exclusive* power to tax. In the *Colville* case decided last term, the Court stated, "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."[3] Section 398c is precisely that "federal law" which has divested the tribes on Executive Order reservations of any power to tax which they might otherwise have enjoyed.

Although Section 398c is stated in permissive terms, *i.e.*, "Taxes *may* be levied and collected by the state. . .," it is clear from the Legislative history that Congress intended thereby to permit the States, if they should so desire, to levy taxes upon production of minerals on Executive Order Indian reservations, and this opportunity was to be exclusive, while reserving to the respective Tribes all the income from the accompanying rentals, royalties and bonuses in 25 U.S.C. §398b. This division of income constituted a purposeful, delicate weighing of interests by Congress, and the resolution of those competing interests by Congress should not be disturbed by this Court.

Carl Hayden, the sponsor of the bill in the House of Representatives, made clear that the intent of the bill was to allow the mineral development of Executive

---

[3] Washington v. Confederated Tribes of the Colville Indian Reservation, 65 L.Ed. 10.28 (1980).

Order Indian lands and to insure an equitable apportionment of the revenues generated thereby.[4] Congressman Hayden was clearly concerned that the Indians on Executive Order reservations were not receiving any income from the leases which had been issued on their lands under the General Leasing Act of 1920, 41 Stat. 139 (1920):

> Commissioner [of Indian Affairs] Burke. To make that a little clearer, what the bill you are describing was proposed to do, was to give to the Indians the share of royalties that were going to the reclamation fund and to the United States Government. The Indians were not getting anything.
>
> Mr. Hayden. The money had not been actually distributed as you have described, but the law designated that it should be divided that way. Every one felt that it was not right to take all of the money that came from the Executive order reservations without the Indians receiving a cent of it.[5]

Why was federal legislation necessary to provide for income to the Indians who were not "receiving a cent" of benefit from the leasing, if all they had to do was enact a tax? The answer is that the Tribes could not lawfully enact such a tax, and the 1927 compromise legislation is based on that assumption by Congress.

In addition to insuring that the Indians received a share of the income from mineral leases, something which they were not receiving at all under the permits issued pursuant to the General Leasing Act of 1920, 41 Stat. 139 (1920), Congressman Hayden was concerned,

---

[4] *Leasing of Executive Order Reservations: Hearings on H.R. 9133 Before a Subcomm. of the House Comm. on Indian Affairs*, 69th Cong., 1st Sess. 8-10 (1926).

[5] *Id.*, at 10.

along with other members of Congress, that an equitable sharing of that income be effected between the Tribes and the States. There was much discussion concerning whether the income to the State should be in the form of a percentage of the bonuses, rentals and royalties or in the form of a tax levied by the State. For instance, Congressmen Snyder and Hayden, managers for the House in the conference committee on an earlier draft bill, reported as follows:

> The amendment to the original text of the bill substitutes a definite share in the bonuses, rentals, and royalties from the oil, gas, coal, etc., for the right to tax the production of minerals granted to the State by the House amendment. The percentage to be paid to the State is the same as is now provided in the general leasing act from such minerals when produced on the public domain. There is no limitation in the House amendment upon the tax that might be levied except that it shall be general and the power to tax is the power to destroy.
>
> The precentage to be deposited in the Treasury to the credit of the Indians is equal to a combination of the 10 per cent paid to the United States and the 52 1/2 per cent paid into the reclamation fund as provided in the general leasing act. Out of the Indians' share of 62 1/2 per cent Congress can make appropriations from time to time for all the expenses of administration. The Federal Government should not seek to make a profit from the Indians and they have a more equitable claim to the royalties than the reclamation fund. [6]

Further on in the discussion, we find additional colloquy concerning the choice between reserving to the States a

---

[6] *Id.*, at 17.

percentage of the bonuses, royalties and rentals, on the one hand, and the power to tax on the other:

> Mr. Frear. What is the reason that section 1 could not cover all the rights of the Indians as provided by this law of May 29, 1924 [25 U.S.C. §398]? Why is it necessary to provide in this bill for the 37 1/2 per cent and for the 62 1/2 per cent, instead of allowing all oil production from the Executive order reservations to go the same as from the regular Indian reservations?
>
> Commissioner [of Indian Affairs] Burke. What is the reason for it?
>
> Mr. Frear. Why not have it all go alike?
>
> Commissioner Burke. We would be very pleased to have it that way.
>
> Mr. Frear. Why would it not be sufficient, outside the exception of those people who applied for a permit? What is the objection of having section 2 in the bill?
>
> Commissioner Burke. You can not get the legislation unless it is in there.
>
> Mr. Frear. But that would then put the Executive order reservations simply upon the same plane with a treaty reservation.
>
> Commissioner Burke. My answer to that would be this: You have asked a question that affects the situation generally. It might be very desirable from the Indian standpoint to do just what you say, but these States that have these great areas in Indian reservations have discovered they are living under a handicap, in that they have great areas of lands that are not susceptible of taxation. They endeavored some years ago to have legislation by which they would have had something from these areas to reimburse the states for having this liability of so much non-taxable property, and they came in, when the

legislation was proposed, and made a claim that they must have some part of the production or that they would oppose the legislation.

We did the best we could so far as we are concerned. We compromised, and in trying to get some legislation, trying to get something for the Indians, we consented that 37 1/2 per cent might be diverted and would be used for road construction upon the reservations or roads into the reservations or for the education of Indian children. This is a compromise.

Mr. Frear. What would be the particular interest of the state to insist upon that 37 1/2 per cent for road building, unless it was for the benefit of the State roads?

Commissioner Burke. That is for the State —

Mr. Frear. I am trying to ascertain why this 37 1/2 per cent and 62 1/2 per cent — that division — must be accepted by the bureau in order to secure the passage of the bill.

Commissioner Burke. As a matter of compromise.

Mr. Frear. Supposing the State was given 10 per cent, and given it outright, and the balance go to the Indians?

Commissioner Burke. We would be perfectly satisfied.

Mr. Frear. I was going to ask this: There was a law passed. I think it is this law of May 29, 1924 [25 U.S.C. §398], which provides that all the production of oil may be taxed by the State. That law is in force now, as I understand it.

Mr. Hayden. Only oil produced on treaty reservations.

Mr. Frear. But it can be taxed in your State if you pass a law of that kind, can it not?

> Commissioner Burke. I will tell you another thing, Mr. Congressman. You will notice that in this bill it provides, "in lieu of taxes."[7]

It is clear from such discussions as those quoted above that the legislation, when it was finally passed into law, was a compromise regarding the shares of the production going to the Indian and State governments, *and that compromise consisted of giving 100% of the royalties to the Indians and 100% of the power to tax to the States.*

The contention of the Jicarilla Tribe that the Indian Mineral Leasing Act of 1938, 25 U.S.C. Section 396a-396g, impliedly repealed Section 398c is without merit. New Mexico, for instance has exercised its exclusive power to tax the severance of oil and gas throughout the State since 1937,[8] and more than 40 years have passed since the enactment of the Indian Mineral Leasing Act in 1938. If there had been any doubt at the time of enactment of the latter act as to the validity of Section 398c and the exclusivity of the State's power to tax, it would have been asserted long before this. An example of how generally this view is held is the 1977 statement of the American Indian Policy Review Commission, in discussing mineral leases of Indian lands, that "Indians do not both tax and receive royalties. Usually they just receive royalties."[9]

Moreover, there is no reference at all in the 1938 Act to taxation of oil and gas from Indian Lands, much

---

[7] *Id.*, at 25-26. For a brief description of the history of the bill in Congress, *see, e.g.*, H. R. Rep. No. 1791, 69th Cong., 2d Sess. 2 (1927).

[8] *See* ch. 103, 1937 N.M. Laws 290.

[9] American Indian Policy Review Commission, Final Report 344 (1977).

less any mention of such taxation on Executive Order Indian lands. If the 1927 Act and 1938 Act are taken as a whole, there is only one provision dealing with the power of the States to tax, Section 398c. Since there is no provision to conflict with 398c, there can be no real question of an implied repeal of 398c. Indeed, a mere change in the administrative relationship between the Tribes and the Secretary of Interior with respect to the handling of reservation mineral leases could not possibly have altered the substantive right of the States to exercise their exclusive power of taxation. In general, there can be no repeal by implication of a specific statute such as Section 398c by a general statute such as the Indian Mineral Leasing Act of 1938 absent a clear intention by Congress to do so. *E.g., Morton* v. *Mancari*, 417 U.S. 535 (1974).

II.

The Decision Of The Tenth Circuit Threatens To Impose Unreasonable Burdens On The Citizens Of The States

The States are also concerned by the effect that the holding of the Tenth Circuit Court of Appeals will have on its citizens. While Indians residing within the State of New Mexico are citizens of the State and may participate in the political process which determines the existence and rate of taxes imposed by the State of New Mexico,[10] the obverse is not true, that is, nonmembers of the Jicarilla Apache Tribe are disenfranchised with respect to the adoption and determination of the rate of Tribal taxes. If the tribes are held to have taxing authority over non-Indians, the disenfranchised non-Indian is at the

[10] *See* Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

mercy of governmental bodies which have no interest in treating him equitably. And if this power exists, the dollar amount of the burden imposed can be increased practically without limit. *Right of the Cherokees to Impose Taxes on Traders*, 1 Op. Att'y Gen. 645 (1824). The potential for abuse is obviously substantial. The primary check that keeps government taxation from exceeding socially acceptable limits is the power of the ballot box, and that check is clearly absent in the case of taxation of non-Indians by the Indian tribes. Once the foot is in the door allowing such taxation at all, the rates are not generally subject to limitation, and any arguments based on present tax rates are merely speculative and can be misleading. For a case involving, the imposition of a 25% tribal tax on top of pre-existing state taxes, *See Crow Tribe of Indians* v. *Montana*, 469 F.Supp. 154 (D. Mont. 1979).

In addition, the States are concerned that the imposition of taxes such as those imposed by the Jicarilla Apache Tribe Oil and Gas Severance Tax Ordinance will lead to a decrease in the production of oil and gas and significant increases in the energy costs for consumers. The Trial Court found that wells that are presently marginal will be abandoned as a result of the increased burden placed upon them if the proprosed Jicarilla tax is held to be valid (Findings Nos. 34 & 35). Again, once the tax is approved in principle, it may be increased practically without limit.

The increase in energy costs occasioned by additional tax burdens may also be significant, resulting in the imposition of the burden of supporting tribal government on non-reservation consumers.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be reversed and remanded to that court with directions to enter an order affirming the judgment of the District Court for the State of New Mexico permanently enjoining the enforcement of the Jicarilla Apache Tribe's Oil and Gas Severance Tax Ordinance.

Respectfully submitted,

BRUCE L. HERR
Counsel of Record

JOHN B. DRAPER
GARY R. KILPATRIC
Of Counsel

MONTGOMERY & ANDREWS, P.A.
P.O. Box 2307
Santa Fe, N.M. 87501
(505) 982-3873

Counsel for Amicus Curiae State of New Mexico

ALLEN I. OLSON
Attorney General

ALBERT R. HAUSAUER
Special Assistant Attorney General

State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

Counsel for Amicus Curiae
State of North Dakota

ROBERT B. HANSEN
Attorney General

RICHARD L. DEWSNUP
MICHAEL QUEALY
Assistant Attorneys General

301 Empire Blvd.
231 East 4th South
Salt Lake City, Utah 84111
(801) 533-4446

Counsel for Amicus Curiae
State of Utah

JOHN D. TROUGHTON
Attorney General

RON ARNOLD
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82202
(307) 777-7841

Counsel for Amicus Curiae
State of Wyoming